No. 46935-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Koran Butler,

Appellant.

Pierce County Superior Court Cause No. 14-1-00453-4

The Honorable Judge John Hickman

Appellant's Reply Brief

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I. MR. BUTLER'S IDENTITY THEFT CONVICTION VIOLATED HIS RIGHT TO A UNANIMOUS JURY.

Mr. Butler had a right to a unanimous jury verdict under Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). His identity theft conviction was entered in violation of this right because the jury was not unanimous as to the means of commission.

A. Identity theft is an alternative means crime.

An alternative means crime is one categorizing distinct acts that amount to the same crime. *State v. Harrington*, 181 Wn. App. 805, 818, 333 P.3d 410 *review denied,* 337 P.3d 326 (Wash. 2014). Statutes create alternative means when the disjunctive terms are "not merely descriptive or definitional but rather, separate and essential terms of the offense." *State v. Peterson*, 174 Wn. App. 828, 851, 301 P.3d 1060 *review denied,* 178 Wn.2d 1021, 312 P.3d 650 (2013).

Thus, for example, language creates alternative means by referring to a person who, "with criminal negligence, starves, dehydrates, or suffocates an animal." *Id.,* at 851-853 (addressing the three alternative means of committing animal cruelty set forth in RCW 16.25.205(2)). Under that statute, starvation, dehydration, or suffocation are "three

distinct ways of committing the crime... [They] are not descriptive or definitional but are essential elements." *Id.,* at 852.

Similarly, a statutory provision creates three alternative means by referring to an attempt to prevent a domestic violence victim "from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official." *State v. Nonog*, 145 Wn. App. 802, 812, 187 P.3d 335 (2008) *aff'd on other grounds,* 169 Wn.2d 220, 237 P.3d 250 (2010) (addressing interfering with domestic violence reporting, RCW 9A.36.150(1)). These variations "in the conduct of the would-be reporter... are not merely descriptive or definitional of essential terms. The variations are themselves essential terms." *Id.*[1]

Identity theft is an alternative means crime. The statute provides that "[n]o person may knowingly obtain, possess, use, or transfer a means of identification or financial information" with intent to commit a crime. RCW 9.35.020(1). This disjunctive language creates alternative means because the terms are "not merely descriptive or definitional but rather, separate and essential terms of the offense." *Peterson*, 174 Wn. App. at 851.

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[1] As these examples show, alternative means need not be separately enumerated in the statute. *Id.; Peterson*, 174 Wn. App. at 851-53.

This analysis is consistent with *Lindsey* and *Owens,* the two cases upon which Respondent relies. Brief of Respondent, pp. 5-9 (citing *State v. Lindsey*, 177 Wn. App. 233, 240-41, 311 P.3d 61 (2013) *review denied,* 180 Wn.2d 1022, 328 P.3d 903 (2014); *State v. Owens*, 180 Wn.2d 90, 98, 323 P.3d 1030 (2014)).

In *Owens,* the Supreme Court approved the *Lindsey* court's analysis of language defining trafficking in stolen property:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1). In both cases, the defendant argued that this language created eight alternative means. The *Lindsey* and *Owens* courts rejected this argument, and found that the language created only two means.

Respondent ignores the main part of the *Lindsey*/*Owens* analysis. Both courts focused on the fact that multiple terms in the statute describe the same thing.

The *Lindsey* court found that the initial group of seven terms ("initiates, organizes, etc.") "relate to different aspects of a single category of criminal conduct [and thus] appear to be definitional." *Id.,* at 241-242. The *Owens* court "agree[d] with the analysis and conclusion in *Lindsey,*"

and pointed out that the first seven terms "are merely different ways of committing one act." *Owens*, 180 Wn.2d at 98-99.

By contrast, the four means of committing identity theft – obtaining, possessing, using, or transferring financial information— describe four different actions. RCW 9.35.020(1). They do not "appear to be definitional,"[2] because they are not merely "different ways of committing one act." *Owens*, 180 Wn.2d at 99.

Having overlooked the primary aspect of the *Lindsey* and *Owens* opinions, Respondent goes on to misinterpret the remainder of the analysis.

The *Lindsey* court concluded that the statutory language "easily divides into two sections" rather than eight different sections.[3] *Id.,* at 242. Accordingly, the statute created only two alternative means, with "[e]ach clause describ[ing] distinct means of committing the offense." *Id.*, at 241

Respondent draws the wrong conclusion from this analysis. Respondent incorrectly and simplistically applies this aspect of *Lindsey* and concludes that the identity theft statute describes only a single

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[2] *Lindsey.,* 177 Wn. App. at 241-242.

[3] Related to this conclusion was its observation that "the placement and repetition of the word 'knowingly' [which] suggests that the legislature intended two means." *Lindsey,* 177 Wn. App. at 241. Similarly, "the statute repeats the word 'who,'" also suggesting two alternative means, rather than eight. *Id.*

alternative means because the word "knowingly" appears only once. Brief of Respondent, p. 8.

Respondent's interpretation would require this court to overrule *Peterson, Nonog,* and other cases finding alternative means in similarly-worded statutes. *See, e.g., State v. Huynh*, 175 Wn. App. 896, 904-06, 307 P.3d 788 *review denied,* 179 Wn.2d 1007, 315 P.3d 531 (2013) (finding that RCW 69.50.401(1) describes three alternative means.) But such cases can be harmonized with *Lindsey* and *Owens.*

A correct reading of *Lindsey* suggests a workable rule that is consistent with both *Peterson* and *Nonog*: if a statute "easily divides" into two or more sections "describ[ing] distinct means of committing the offense," then each section outlines an alternative means and any subsections are definitional. *Lindsey,* 177 Wn. App. at 241-42.

On the other hand, if there is only one section, or if the statute does not "easily divide[ ]"[4] into multiple sections, the various parts are examined to see if they are merely "different ways of committing one act." *Owens*, 180 Wn.2d at 99. If they describe "one act," they comprise a single means of committing the offense (as with the first seven terms of RCW 9A.82.050(1)). If they do not describe one act, the statute creates alternative means.

Here, the four means of committing identity theft do not describe "one act." RCW 9.35.020(1). Thus, for example, a person may obtain or possess financial information without using it or transferring it. This is in contrast to the first seven terms in the trafficking statute, as outlined by the *Owens* court:

> it would be hard to imagine a single act of stealing whereby a person "organizes" the theft but does not "plan" it. Likewise, it would be difficult to imagine a situation whereby a person "directs" the theft but does not "manage" it.

Id.

When properly applied, *Lindsey* and *Owens* are consistent with *Peterson* and *Nonog*. All four cases establish that identity theft is an alternative means crime.

B. The state failed to present information proving that Mr. Butler "transferred" financial information.

The court instructed jurors on alternative means of committing identity theft, but did not require the jury to unanimously agree as to the means. CP 22. In such circumstances, the state must present sufficient evidence supporting every alternative. *State v. Garcia*, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014).

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[4] *Lindsey.*, 177 Wn. App. at 241-242.

Here, the state did not present sufficient evidence supporting the "transferred" alternative. The only evidence suggesting that Mr. Butler "transferred" financial information was evidence that he handed a check drawn on Heritage bank to a teller at Heritage bank. RP 69, 80, 163; Ex. 1. Because the bank already had the information, Mr. Butler did not "transfer" it. RP 69, 80, 163; Ex. 1. Accordingly, his conviction cannot stand. *Id.*

Respondent relies on a misunderstanding of the statute's plain language to argue that sufficient evidence supported conviction under the "transfer" alternative.[5] Brief of Respondent, pp. 12-13. According to Respondent, Mr. Butler transferred financial information because he "carried the check to a new place and took it to another person." Brief of Respondent, p. 13. Respondent suggests that "[b]oth acts" – carrying a check to a new place *and* taking it to another person—"are sufficient to qualify as a transfer of financial information." Brief of Respondent, p. 13.

Respondent is incorrect. Respondent's argument would make sense if the legislature had defined the crime to include transferring a paper document or electronic file *containing* financial information. But the

[5] Respondent also outlines the evidence supporting other alternative means of committing identity theft. Brief of Respondent, pp. 9-12. These alternatives are not at issue here.

statute criminalizes the transfer of information itself, not the document or file containing the information.

Physically moving a check from one location to another cannot, by itself, qualify as transferring financial information. Similarly, giving a check to someone already familiar with the financial information printed on it cannot qualify as transferring the information.

Mr. Butler gave a check drawn on Heritage bank to a teller at that bank. He did not transfer any financial information; the bank already had the information. Accordingly, the evidence was insufficient to support the "transfer" alternative means.

The lack of a unanimity instruction or a special verdict requires reversal of his conviction and remand for a new trial. *Garcia*, 179 Wn.2d at 835-36. He may not be retried on the "transfer" alternative of identity theft. *Garcia*, 179 Wn.2d at 844.

II. MR. BUTLER'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE AT SENTENCING.

Mr. Butler rests on the argument set forth in the Opening Brief.

III. THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. BUTLER'S ABILITY TO PAY DISCRETIONARY LFOS.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d

827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement expressing hopes for employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the length of incarceration will affect that ability.

In this case, the fact that Mr. Butler "was employed prior to his arrest" does not mean that he would be employed following conviction for forgery and identity theft. See Brief of Respondent, p. 22. Furthermore, Mr. Butler faced extradition to Florida where he'd been charged with numerous felonies including robbery. RP 207. The court apparently accepted these facts (as can be seen by its refusal to impose the full $1500

DAC recoupment requested); however, these sparse facts do not equate to an adequate inquiry into Mr. Butler's financial circumstances.

Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Vansycle*, No. 89766-2, 2015 WL 4660577 (Wash. Aug. 5, 2015).[6]

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina.*

IV. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. BUTLER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. Butler rests on the argument set forth in the Opening Brief.

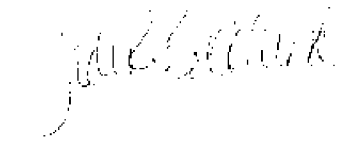
CONCLUSION

Mr. Butler's convictions must be reversed and the case remanded for a new trial. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

[6] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

Respectfully submitted on September 8, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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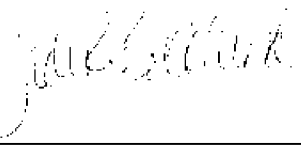
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 8, 2015.



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